BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matters of :	
MONROVIA UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	CASE NO. N2006030450
STUDENT, Petitioner, v. MONROVIA UNIFIED SCHOOL DISTRICT, Respondent.	CASE NO. N2006030889
MONROVIA UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	CASE NO. N2006070097

DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on July 10, 11, 12, 13, and 14, 2006, and August 10, 11, 14, and 15, 2006, in Monrovia, California.

Student was represented by N. Jane DuBovy, Esq. Also present for Student at the hearing was advocate Carolina D. Watts and Student's Father.

Monrovia Unified School District (District) was represented by Nancy Finch-Heuerman, Esq. Also present for the District was Director of Special Education Gail Crotty.

PROCEDURAL HISTORY

On March 10, 2006, the District filed a request for due process hearing (Case No. N2006030450). On March 24, 2006, Student filed a request for due process hearing (Case No. N2006030889) and a motion to consolidate Student's case with the District's case. On April 10, 2006, OAH issued an order consolidating the two cases, and ordering that the "applicable timelines for resolution, hearing, and decision will run from the date the complaint was filed in case number 2006030889."

On June 21, 2006, the District filed a second request for due process hearing (Case No. N2006070097), along with a motion to consolidate the second due process request with the two pending cases. By order dated July16, 2006, OAH denied the District's motion to consolidate without prejudice.

The hearing on the two consolidated matters was held on July 10-14, 2006. The hearing did not conclude on July 14, and two additional hearing days were scheduled for August 10 and 11, 2006. On July 18, 2006, the District renewed its motion to consolidate its second due process complaint with the two previously consolidated matters. By order dated July 24, 2006, OAH granted the District's motion to consolidate, and two additional hearing days were scheduled for August 14 and 15, 2006.

At the conclusion of the due process hearing on August 15, 2006, the record was held open for the parties to file written closing briefs. Closing briefs were timely received from both parties and marked for identification as Student's Exhibit 49 and District's Exhibit HHHH, respectively. The record was closed and the case was submitted on September 1, 2006.

ISSUES[1]

1. Did the District offer Student a free appropriate public education (FAPE) in the least restrictive environment for the 2005-2006 school year, based on the February 9, 2006 individualized education program (IEP) and May 1, 2006 IEP?

2. Did the District fail to offer Student a FAPE for the 2005-2006 school year and prospectively for the 2006-2007 school year?

[1] The issues have been restated for clarity of analysis. The parties withdrew the issues relating to assessments because they resolved those issues during the course of the due process hearing.

3. Did the District commit procedural violations in connection with the December 9, 2005 IEP and/or the December 20, 2005 intake meeting by:

A. Failing to adopt and provide services comparable to those described in the December 9, 2005 IEP and failing to develop and implement a new IEP within 30 days of Student's transfer into the District?

B. Failing to have all required members of an IEP team present at the December 20, 2005 intake meeting?

C. Unilaterally changing Student's placement at the December 20, 2005 intake meeting?

4. Did the District commit procedural violations in connection with the IEP meetings held on February 9, 2006 and/or May 1, 2006 by:

A. Failing to schedule the February 9, 2006 meeting at a mutually agreeable time and place, and thereby failing to insure parent participation in the development of the IEP?

B. Failing to develop a legally sufficient IEP at the February 9, 2006, and May 1, 2006, meetings?

PARTIES' CONTENTIONS

The District contends it offered Student a FAPE for the 2005-2006 school year in the least restrictive environment (LRE) by offering him a special day class (SDC) on a general education campus with mainstreaming opportunities. The District's offer of FAPE was developed at IEP meetings on February 9, 2006, and May 1, 2006. Student contends the District's offer does not constitute a FAPE because he believes the LRE is full-inclusion in a third grade general education classroom.

Student also contends the District committed procedural violations in determining his placement following his transfer into the District on December 12, 2005, from another school district within the state. Student contends the District was required, at the time of his transfer, to either adopt the last IEP developed by his previous school district and approved by Father, or else develop and implement a new IEP within 30 days of his transfer into the District. Student's last IEP consented to by Father from his previous school district was developed at a meeting on December 9, 2005. The December 9, 2005 IEP required Student's placement in a third grade general education classroom. The District contends it was not required to provide the placement described in the December 9, 2005 IEP because that IEP was never implemented because Student transferred into the District on December 12, 2005, which was the date the services and placement were to begin under the December 9, 2005 IEP. The District contends it acted appropriately in continuing Student's last-implemented placement from his previous school district (i.e., independent study/home instruction) for an

interim 30-day period and then holding an IEP meeting to determine Student's educational program and services.

Student also contends the District committed procedural violations in developing the February 9, 2006 IEP and the May 1, 2006 IEP. Student contends the District failed to schedule the February 9, 2006 IEP meeting at a mutually convenient time and place and, thus, failed to ensure parent participation. Student also contends Father could not adequately assess the District's offer of FAPE because the IEP documents lacked legally required information, such as the method for measuring progress on the IEP goals, a schedule for reporting Student's progress on the goals, a description of the supports and modifications necessary for Student's participation in mainstreaming activities (i.e., lunch, recess, assemblies), and the IEP team's rationale for placing Student in an SDC rather than a general education classroom.

The District contends it did not commit procedural violations. The District contends that Student is not entitled to compensatory education services or reimbursement from the District.

FACTUAL FINDINGS

Background

1. Student is an 11-year-old boy with multiple disabilities who has been diagnosed with cerebral palsy, seizure disorder, cortical blindness[2], and global developmental delays. Student resides with his mother and Father within the jurisdictional boundaries of the District.

2. Student is non-verbal and an effective communication system has not yet been identified for him. Student cannot communicate his wants or desires other than by responding to yes-or-no questions posed to him. Student communicates a "yes" response by smiling, lifting his left hand, or making a sighing sound. Student communicates a "no" response through either a flat affect or not responding. However, Student is not consistent in using these "yes" and "no" signals, making it difficult to determine if, for example, a limb movement is truly a communication or simply an involuntary movement caused by his cerebral palsy.

[2] Although Student's cortical blindness renders him legally blind, he is able to see with his eyes. With cortical blindness, the eye itself can see and is receiving and recording messages, but the recording and translation of the messages goes awry. The term "cortical blindness" means the person is blind because the cortex of the brain is not acknowledging what the person sees. Student can see but because of the cortical blindness he does not always understand, withhold, or make associations with what he sees. Therefore he cannot use vision alone or auditory prompts alone to ensure that he sees. Children with cortical blindness must be treated as though they have a neurologic impairment that prevents them from appropriately downloading what they see and then recovering it when looking at the same object again.

3. Student is non-ambulatory. He requires assistance for changing from one body position to another (i.e., from sitting to standing) or transitioning between his equipment (i.e., switching from his wheelchair to his stander). Student is most responsive when he is in his stander or lying on his side. Physical therapist Dayle Armstrong recommended Student's position should be changed every hour during the school day. Because of his cortical blindness, materials need to be enlarged and positioned so Student can see them. Student has been observed by several of his providers to show an anxious "laughter" and kicking and arm movements when he is in a quiet environment and an unexpected noise occurs, such as a telephone ring or a person coughing.

4. From 1998 to 2000, Student attended a special education pre-school class at Canyon Early Learning Center, which is within the District. From January 2002 until May 2002, Student attended a grade one/grade two SDC at Norwood School through the Los Angeles County Office of Education (LACOE). Student's teacher in the SDC was Karen Boucher.

California Virtual Academy (CAVA)

5. In December 2002, Student's parents enrolled him in the California Virtual Academy (CAVA), which is a network of charter schools offering an independent study/home study program. Student was in the CAVA program from December 2002 until December 2005. Student enrolled in the "CAVA at Kern" program through the Maricopa Unified School District in Kern County. The charter for CAVA at Kern provides it can service pupils in any counties that are contiguous to Kern County. Thus, CAVA at Kern services pupils from Los Angeles County, such as Student.

6. CAVA is an on-line "virtual" school. CAVA does not have a physical location or actual classrooms. In the CAVA program, the child's home is considered the child's classroom. Typically, Student would not have interaction with other CAVA pupils except during CAVA "outings," such as going to a Los Angeles Dodgers baseball game, going to a museum or a play, or a whale-watching trip. CAVA provides an educational curriculum and materials to parents, who then provide instruction to their children at home. Father provided the educational lessons to Student at home and reported the results of the lessons on the CAVA website. In the CAVA program, a general education teacher is supposed to visit the pupil at home a minimum of once per month to review and determine the pupil's mastery of the CAVA curriculum.

7. Kara Miller was the general education teacher who worked with Student in the CAVA program from October 2004 until August 2005, and then for a short time in November 2005.[3] Ms. Miller worked with Student three days per week for one and one-half hours per session. Ms. Miller modified the CAVA curriculum to make it more usable for

[3] Ms. Miller has one year of experience teaching at a middle school, and four years of experience teaching at Monrovia High School. Prior to working with Student, Ms. Miller had no experience or training working with children with severe disabilities such as Student.

Student, and then worked with Student on his lessons. Ms. Miller modified the curriculum by enlarging things visually, using manipulatives, and converting the materials to a yes-or-no question format. Ms. Miller presented the curriculum by posing yes-or-no questions or by presenting Student with a choice of items (usually no more than four choices) and then pointing to each choice until she saw Student raise his hand, which she interpreted as his signal for a "yes" answer. This signal was the only real communicative response Ms. Miller had with Student when she first began working with him in October 2004. After she built up a rapport with Student, Ms. Miller found he responded more consistently. Ms. Miller found Student was more attentive, motivated, and responsive during activities involving tangible things he could see, such as working on a geography lesson using a map or working on a science lesson about rocks and displaying rocks for him to see. Ms. Miller observed Student was less responsive or non-responsive if he was having a "bad day" and being tense, verbally complaining, and making whining noises. Although CAVA provided curriculum for all subject areas, Ms. Miller focused on reading and math. CAVA did not provide Ms. Miller with training on how to work with Student nor advise her where Student was in the CAVA curriculum. Ms. Miller started with the first grade curriculum and used trial and error to see what worked with Student.

8. Katrina Outfleet is the Academic Administrator for CAVA, and has been in that position since July 2004. She first joined CAVA in March 2003 as the Director of Special Education. Ms. Outfleet was the administrator for Student's CAVA IEPs beginning in 2003. During her employment with CAVA, Ms. Outfleet has not provided direct services to Student or any other CAVA pupils.

CAVA IEPs

9. Student's first IEP by CAVA was an interim IEP developed at a meeting on December 12, 2002. Father consented to and signed the December 12, 2002 IEP. Pursuant to that IEP, Student's placement was independent study/home instruction with resource specialist program (RSP) support (five times a week, 60 minutes per session), occupational therapy (OT) (once a week for 60 minutes), physical therapy (PT) (twice a week, 60 minutes per session), adapted physical education (APE) (once a week for 60 minutes), and speech and language (once a week for 60 minutes). All services were direct services. The December 12, 2002 IEP document indicated Student's grade level as second grade.

10. On July 24, 2003, CAVA held an IEP meeting to conduct a three-year review of Student's program. Ms. Outfleet was present at the July 24 meeting. Although a draft IEP document was prepared, the IEP was not signed by the IEP team or Student's parents because the team did not reach a consensus regarding goals and objectives. As established by Ms. Outfleet's testimony, there was never a 2003 IEP that was sent to Student's home. No current placement was indicated on the draft IEP document, which Ms. Outfleet admitted was a "mistake on our part." However, Student's placement continued to be independent study/home instruction.

11. On August 13, 2004, CAVA held an IEP meeting to conduct an annual review of Student's program. Ms. Outfleet was present at this meeting as a special education teacher. Like the previous year, an IEP document was prepared but was never signed by Student's parents. At the time of the August 13, 2004 meeting, Student's placement continued to be independent study/home instruction. The 2003 and 2004 CAVA IEP documents both indicated Student's grade level as third grade.

12. Prior to December 9, 2005, the last IEP signed by Father and implemented by CAVA was the December 12, 2002 IEP.

13. On December 9, 2005, CAVA held an IEP meeting to conduct an annual review of Student's IEP and to discuss changing Student's placement. At the time of the December 9, 2005 IEP meeting, Student's placement was independent study/home instruction through the CAVA program. The December 9, 2005 IEP document stated this meeting was the first time during Student's three years in the CAVA program that the entire IEP team, service providers, CAVA representatives, and Student's parent "met together in a comprehensive setting."

14. At the December 9, 2005 IEP meeting, Father was present along with his attorney. The meeting commenced with a discussion about Student's placement in a full-inclusion, general education classroom. The IEP team then discussed Student's appropriate grade level, and agreed that a third grade general education classroom was appropriate. The team discussed recommendations for the supports and services Student would need in a general education classroom. The CAVA IEP team recommended a full-inclusion, general education classroom even though Student had not received educational instruction in a classroom with other pupils during the three years he was in the CAVA program. The IEP team's placement recommendation was not based on any formal assessment of Student's academic or cognitive abilities.

15. At the December 9, 2005 meeting, the IEP team found Student had "marked improvement academically, socially, and physically." According to Ms. Outfleet's testimony, Student's marked improvement academically was based on the improved ability of his services providers to better "gauge" his responses because, in the previous year, Student did not have consistency in instructors. Student's marked improvement socially was based on observations of Student's interactions and communication through his smiles with other people, which indicated awareness of his surroundings. Student's marked improvement physically was based on observations that Student was able to sit in his chair and focus. Even though Student was non-verbal, the December 9, 2005 IEP document described Student's language proficiency as "age appropriate." Ms. Outfleet explained, at hearing, this meant Student understood age appropriate language. If a person spoke to Student like any other nine or ten year old child, Student "would understand it completely."

16. At the December 9, 2005 IEP meeting, the CAVA IEP team recommended the following RSP services and designated instructional services (DIS): RSP services for 450 minutes per week for the first 45 days of instruction, and then 300 minutes per week for the

period thereafter; speech and language for 90 minutes per week (direct service) and 30 minutes per week (collaborative); OT for 60 minutes per week (collaborative); PT for 120 minutes per week (direct service) and 60 minutes per week (collaborative); and APE 60 minutes per week (direct), 45 minutes per week (group), and 15 minutes per week (collaborative). Father consented to the December 9, 2005 IEP.

17. The December 9, 2005, CAVA IEP was never implemented because Student transferred to the District on December 12, 2005, which was the date the services and placement were set to begin under the December 9, 2005 IEP. Furthermore, CAVA itself could not implement the December 9, 2005 IEP because it does not have a school site with actual classrooms.

Student's Transfer to the District and the December 20, 2005, Intake Meeting

18. On December 12, 2005, Father enrolled Student in the District by submitting the required enrollment forms and presenting sufficient proof of residence to the District's administration office. Father also provided a copy of the December 9, 2005 IEP and requested a full-inclusion, general education placement.

19. Gail Crotty is the Director of Special Education for the District. Ms. Crotty has 29 years experience as an educational professional. She first came to the District in September 2003. Ms. Crotty has a bachelor's degree in health/pre-physical therapy, a master's degree in educational administration, APE and learning handicap credentials, an RSP certificate, and a CLAD certificate. She has worked as an APE specialist, SDC teacher, RSP specialist, a program specialist in special education and in curriculum, an assistant principal, a principal, and as a Director for Special Education for La Canada Unified School District and then the District. She has worked with severely handicapped students throughout her career, particularly when she was an APE specialist at a severely handicapped site. In her career, Ms. Crotty has worked with at least 20 pupils with severe disabilities comparable to Student. Ms. Crotty presented a professional demeanor and testified in a straightforward, credible manner.

20. Typically, when a special education pupil enrolls in the District, the parent goes to the Pupil Services Office and proves residence and provides records, IEPs, and any other relevant information. Based on Ms. Crotty's review of the IEP, she determines the pupil's interim placement or schedules an intake meeting if she deems it necessary. Typically, an intake meeting will not be held when the pupil's last IEP is clear, the placement is clear, and the placement is one that the District can accommodate based on the information contained in the IEP.

21. Ms. Crotty was notified of Student's enrollment in the District. Based on her review of the December 9, 2005, CAVA IEP, Ms. Crotty scheduled an intake meeting in Student's case. Ms. Crotty testified at length regarding her concerns about the December 9, 2005, CAVA IEP, including that the District was being asked to implement a new IEP that required a change in placement that had not been implemented by Student's previous school

district, the present levels of performance in the IEP document were unclear and referred to reports that were not attached, some of the goals in the IEP document were not measurable, and some of the goals appeared to be on different developmental levels. For example, one goal involved Student giving a smile when prompted with the cue "give a big smile now," while another goal involved Student writing a three paragraph report using the third grade curriculum. Ms. Crotty was concerned about whether Student could succeed in the proposed general education setting, since he had been in the CAVA program and had not been in a classroom setting with other pupils. Ms. Crotty felt there was a "disconnect" in having Student jump from an independent study program to full-inclusion in a general education classroom, particularly a classroom not at Student's grade level chronologically. Ms. Crotty was also concerned that the December 9, 2005, CAVA IEP document indicated the placement recommendation was determined at the beginning of the IEP meeting rather than at the end of the meeting after present levels of performance, goals and objectives, and services had been discussed.

22. The last school day in the District before the Winter Break was December 22, 2005. Ms. Crotty's last scheduled day in the office was December 21, 2005. The District scheduled an intake meeting for December 20, 2005, which was Tuesday of the week following December 12, 2005. The December 20, 2005 intake meeting was not an IEP meeting.

23. On December 20, 2005, Ms. Crotty and school psychologist Karen Jinbo met with Father, Student, and their two family friends. Although the District had requested Student's records from CAVA prior to the December 20, 2005 meeting, the only document Ms. Crotty had for the meeting was the December 9, 2005 CAVA IEP.

24. At the December 20, 2005 intake meeting, Father and the District disagreed as to the appropriate placement for Student. Father wanted a full-inclusion, general education placement based on the December 9, 2005, CAVA IEP. The District, however, offered to continue Student's independent study/home instruction placement for an interim 30-day period, and thereafter the IEP team would meet to review Student's performance levels and plan his educational program. The interim 30-day period would allow the District's service providers to become familiar with Student and his needs prior to the 30-day-review IEP meeting. Ms. Crotty explained to Father the District would provide an interim placement based on Student's last-implemented IEP, but not based on the December 9, 2005 CAVA IEP because the latter IEP was never implemented. Father was not pleased and expressed frustration that Student was not being placed in a general education classroom.

25. At the December 20, 2005 intake meeting, the District made the following interim offer of placement and services: independent study/home instruction with support from a special education teacher for five hours per week; speech and language for 90 minutes per week; OT for 30 minutes per week; PT for 120 minutes per week; and APE for 60 minutes per week. All of the services were direct service and would begin on January 9, 2006, which was the first school day after the Winter Break. In the interim, the service providers would be contacted to arrange schedules so Student could receive services starting

on January 9, 2006. An IEP meeting would be held within 30 days of January 9, 2006, to review Student's progress and develop his educational program. The amount of services for OT, PT, APE, and speech and language was based on the information provided by Father at the December 20, 2005 intake meeting regarding Student's current services, as well as the December 9, 2005 CAVA IEP. Father did not agree with the District's interim offer.

26. Ms. Crotty believed that implementing Student's prior placement (i.e., independent study/home instruction) for the first 30 days complied with the law as she understood it, especially since the District was providing the services Student had been receiving at the time. Ms. Crotty explained, at the hearing, that the most important thing to consider with a transfer student is continuity in the student's program and avoiding a disruption or break in services. Because Ms. Crotty had so many concerns about the December 9, 2005 CAVA IEP, she believed the appropriate action regarding Student was to continue his existing services and placement, allow the District's service providers an opportunity to work with Student, and then have the IEP team meet to determine Student's placement within the District.

27. The District's offer of continuing the independent study, home instruction program was appropriate because it minimized any disruption in Student's educational program pending the resolution of the disagreement over placement between Father and the District. For the three years prior to his re-enrollment in the District on December 12, 2005, Student's program was an independent study/home instruction program through CAVA. Student had not received educational instruction on a daily basis in a classroom setting with other pupils for three years. The full-inclusion, general education placement recommended in the December 9, 2005 IEP would be significantly different. The District's interim offer allowed Student to continue his home instruction, while giving the District 30-days to become familiar with Student and his needs, thereby providing additional information for the IEP team to consider when determining Student's placement. If the District was required to hold the IEP meeting within 30 days of December 20, 2005, then due to the Winter Break, the District's providers would have had only two weeks to work with Student before a January 20, 2006 IEP meeting.

28. The District's interim offer of services (i.e., speech and language, OT, PT, and APE) was also appropriate. The services offered were based on information provided by Father at the December 20, 2005 meeting. The District's offer was for more direct, one-on-one services than provided in the December 9, 2005 CAVA IEP, which called for more collaborative services. The December 9, 2005 CAVA IEP provided for collaborative services in the areas of speech and language, OT, PT, and APE, because Student's placement under that IEP was in a general education classroom. Collaborative services are primarily to provide training and instruction to Student's teacher, aides, and others working with him in a classroom. Since the December 20, 2005 interim offer continued Student's placement as independent study/home instruction, collaborative services were not necessary.

29. The December 20, 2005 intake meeting was held within a reasonable time of Student's re-enrollment in the District. Student was enrolled on Monday, December 12, 2005, and the intake meeting was held on December 20, 2005, which was Tuesday of the following week. There was no undue delay in developing an interim program for Student. Ms. Crotty's last day in the office before the Winter Break was December 21, 2005. The first school day after the Winter Break was January 9, 2006. During the Winter Break, arrangements were made with service providers so Student would begin to receive services as of the first school day, January 9, 2006.

30. The District did not commit procedural violations in connection with the December 20, 2005 intake meeting. The District complied with its obligation to provide Student a FAPE following his transfer into the District on December 12, 2005.

31. Pursuant to the District's December 20, 2005 interim offer, on or about January 9, 2006, Student received speech and language, APE, OT, and PT services provided by the District. However, during the 30-day interim period, Student did not receive five hours per week of home instruction. The first teacher sent by the District and approved by Student's parents resigned from the assignment after making one visit to Student's home. Father rejected the subsequent teacher sent by the District, Karen Boucher. No clear evidence was offered as to Father's reason for rejecting Ms. Boucher. The District was unable to locate another appropriately credentialed teacher for the assignment, although the District continued to offer Ms. Boucher. Father suggested using Student's former CAVA teacher Kara Miller. The District rejected the suggestion because Ms. Miller did not hold the appropriate credential. The District is obligated to provide its pupils with appropriately credentialed teachers.

Scheduling the February 9, 2006, IEP Meeting

32. In accordance with the District's offer made at the December 20, 2005 intake meeting, the District scheduled an IEP meeting for February 9, 2006, which was 30 days from January 9, 2006. On January 20, 2006, the District sent Father an invitation for the meeting. Father agreed with the February 9, 2006 meeting date and indicated he would attend the meeting. However, three days before the meeting, Father's attorney requested the District reschedule the meeting because Father did not have child care available for Student. The day before the meeting, Father reiterated his request to reschedule the meeting to mid-March or April. The District offered the opportunity for Father or Student's mother to participate in the meeting by telephone, or to allow Father to bring Student to the meeting as he had done at the December 20, 2005 meeting and other IEP meetings. The District also offered to meet with Student's mother or schedule another meeting after February 9, 2006, to meet with the parents to review the proposed IEP. Student's parents refused to participate in the meeting by telephone or otherwise. Because of the statutory 30-day deadline on the interim placement and services, the IEP meeting could not be rescheduled to mid-March or April as requested by Father.

33. The District took appropriate steps to ensure the participation of one or both of Student's parents in the February 9, 2006 IEP meeting. The District provided sufficient notice of the meeting to Student's parents, through the January 20, 2006 invitation and at the December 20, 2005 intake meeting, where Father was informed an IEP meeting would be held within 30 days of the commencement of interim services on January 9, 2006. Father initially agreed to the February 9, 2006 meeting date. No evidence was presented that Student's mother was unavailable to attend the meeting or provide child care for Student. No persuasive evidence was presented that Father could not have brought Student to the meeting as he had done in the past. The District also offered to schedule a second meeting to review the proposed IEP with the parents. The District made every effort to ensure the participation of one or both of Student's parents in the IEP process. The parents chose not to participate. The District complied with the procedural requirements in scheduling the February 9, 2006 IEP meeting.

34. The District held the IEP meeting on February 9, 2006, without participation from Student's parents. The purpose of the meeting was to review Student's 30-day interim placement and develop a plan for his educational program. The persons attending the meeting included Gail Crotty, speech therapist Melissa Stenzel, APE teacher Sheri Castro-Nowak, general education teacher Erin Grycel, OT specialist Kimberlee Waters, and physical therapist Dayle Armstrong. Ms. Stenzel, Ms. Castro-Nowak, Ms. Waters, and Ms. Armstrong are the service providers who worked with Student during the 30-day interim period.

35. There is no dispute that Student has unique educational needs that qualify him to receive special education services. The evidence established Student has needs in the areas of cognitive functioning, functional and academic skills, PT, OT, APE, and speech and language. The disagreement between the District and Student in this case centers on what constitutes the LRE for Student -- a special day class with opportunities for mainstreaming or full-inclusion in a general education classroom.

Offer of FAPE

36. The District's offer of FAPE for the 2005-2006 school year was developed at IEP meetings held on February 9, 2006, and May 1, 2006.

37. At the February 9, 2006 IEP meeting, the IEP team reviewed and discussed Student's needs and his present levels of performance based on the observations of the service providers over the 30-day interim period. New goals and objectives were developed to meet Student's needs in the areas of PT, speech and language, OT and APE. The IEP team agreed to continue the academic goals developed by CAVA in the December 9, 2005 IEP until a new academic assessment was completed. The IEP team determined Student should be considered fourth grade age for placement purposes. The IEP team also recommended continuing Student's placement and DIS services in the home setting until he transitioned to a school environment, at which point DIS services could be provided on-site. After a lengthy discussion of the full continuum of placements, the IEP team determined that

Student required an SDC placement on a general education campus, but no appropriate SDC was available in the District. Consequently, the IEP team recommended a referral to LACOE to determine an appropriate SDC placement.

38. The District's offer of FAPE at the February 9, 2006IEP meeting consisted of: (1) a comprehensive assessment of Student in several areas, including academic and cognitive development, (2) PT at 120 minutes per week, (3) OT at 30 minutes per week, (4) speech and language at 90 minutes per week, (5) APE at twice per week, 30 minutes per session, (6) placement in an appropriate SDC with a teacher credentialed to provide instruction to moderate-to-severe special education students, (7) a referral to California Children's Services, (8) a referral to LACOE for an appropriate SDC classroom placement, and (9) a one-to-one aide within the educational environment at the school site during school hours.

39. A copy of the February 9, 2006 IEP was sent to Father. Father did not sign or otherwise consent to the February 9, 2006 IEP. Nor did Father sign the proposed assessment plan and LACOE referral forms that were also sent with the IEP.

40. The May 1, 2006 IEP meeting was convened to offer a specific placement at LACOE. Father did not attend, but he was represented at the meeting by his attorney. G. Margaret Tan from LACOE attended the May 1, 2006 IEP meeting. LACOE representatives typically do not attend IEP meetings without a referral form signed by the parents. Father did not sign the LACOE referral form sent by the District. However, Ms. Tan attended this meeting at Ms. Crotty's invitation. Ms. Tan's current position with LACOE is Principal of the Lincoln Principal Administrative Unit (PAU). She has worked for LACOE since 1971. Ms. Tan has a bachelor's degree in psychology with a minor in speech pathology, and master's degrees in speech pathology and education administration. She is a licensed speech and language pathologist, and has credentials in speech and language, severely handicapped, and administration. At the May 1, 2006 meeting, the IEP team discussed Student's possible placement in an SDC on a LACOE campus and the services available on site. The IEP team agreed to continue the goals and objectives and services from the February 1, 2006 IEP, and offered Student a specific placement in an upper grade SDC at Encinitas School with appropriate mainstreaming. The SDC at Encinitas School was offered to Student because it was the most age appropriate of the two SDC classrooms on the Encinitas campus and it had space available to accommodate Student. Father did not sign or otherwise consent to the May 1, 2006 IEP.

Least Restrictive Environment (LRE)

41. When determining whether a placement is the LRE, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect of the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. However, the IDEA's preference for "mainstreaming" (i.e., educating

handicapped children alongside non-handicapped children in a regular educational environment) is not an absolute commandment. In some cases, such as where a child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In this situation continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment.[4]

42. The District's argument is persuasive that Student's handicap is so particularly severe that it would be impossible for him to receive any meaningful education in a full-inclusion, general education setting. Student is non-verbal and has no effective means of communication other than responding to yes-no questions with a smile, raising his hand, or making a sighing sound to signal "yes." Over the years, numerous professionals and agencies have been unsuccessful in identifying an appropriate alternative augmentative communication (AAC) device for Student. Student has received years of intensive and varied service but has made only minimal progress. His functional cognitive level was assessed in 2000 at the one to four month old level. Kara Miller, Student's teacher from CAVA, believes that "full 100 percent inclusion" in a general education classroom would be "overwhelming" for Student.

43. As established by Ms. Tan's testimony, Student would receive significant educational benefits in an SDC on a LACOE general education campus. He would receive instruction from an appropriately credentialed special education teacher assisted by trained paraprofessionals. The majority of the specialized equipment Student requires is generally available at an SDC site, as well as the equipment and privacy to address Student's toileting needs. Student would have opportunities for mainstreaming during lunch, recess, and assemblies, and he can be mainstreamed into a regular education class for academic subjects if he can perform above the curriculum provided in the SDC classroom. Physical therapist Dayle Armstrong has worked with Student for over 10 years, and expressed that the proposed SDC at Encinitas School was a "wonderful classroom" and the teacher was "well-trained." Occupational therapist Kimberlee Waters testified that an SDC is appropriate for Student because that setting provides him with the equipment and staffing he needs, as well as opportunities, depending on the campus, for general education exposure. The education benefits in an SDC weigh in favor of placement in an SDC classroom.

44. No evidence was presented to establish that Student is able to interact with his non-disabled peers. Kara Miller and Dayle Armstrong have not observed Student in an educational setting with other children. Occupational therapist Kimberlee Waters once saw an age-appropriate child attempt to interact with Student at the clinic during one of his OT sessions, but Student did not respond to the child. APE specialist Ms. Castro-Nowak attempted to facilitate interactions between Student and non-disabled children at the preschool center. When other children attempted to communicate with Student, he did not respond to them. Student has not presented evidence that there would be sufficient

[4] *See* Legal Conclusion 9.

nonacademic benefits of interaction with non-disabled peers. This weighs against placing Student in a general education classroom.

45. There is evidence that Student's full-inclusion in a general education classroom would affect the teacher and the other pupils in terms of distracting behavior and undue consumption of teacher's time. Student, his equipment, his toileting needs, and the presence of numerous service providers are likely to be a distraction to the other pupils and require frequent redirection of the entire classroom. Student also reacts negatively to an unexpected noise, such as a telephone ring or a person coughing, by tensing up, making noise complaints, kicking, and exhibiting an "anxious laugh." Student also requires hourly changes in position, alternating between his different pieces of equipment. Toileting is considered a change of position. Student's effect on the teacher and other pupils in the class weigh against placement in a general education classroom. Student offered witness testimony that Student is able to participate in a Sunday school class at his church without being disruptive. However, this is not persuasive evidence that Student would have a similar experience in a general education setting for a full school day.

46. Student's placement in a general education classroom with appropriate services would be more expensive than a placement in an SDC. The costs of a one-to-one aide and DIS services would be incurred regardless of Student's placement. However, placement in a general education classroom would entail several new expenses, such as the cost of a special education teacher as an inclusion specialist and a full-time school nurse to be available on campus to address any medical issues Student may have. The District would also have to purchase specialized equipment that Student requires but is not available on-site.

47. Student's primary witness on the topic of LRE was June E. Downing, Ph.D., who is currently a professor in the Department of Special Education at California State University, Northridge. Dr. Downing has a bachelor's degree in sociology, a master's degree in education of the visually handicapped, and a Ph.D. in severe multiple disabilities. She has lectured extensively and written numerous books and articles in her field, including full-inclusion of disabled children in the general education setting. Dr. Downing is not a licensed psychologist. Dr. Downing has visited Student at his home on two separate occasions. The first occasion was a one and one-half hour visit with Student and his Father at their home on October 18, 2002. Dr. Downing watched Student interact with Father as she conversed with Father about Student. The second occasion was a two hour visit with Student and his Father at their home on March 8, 2006, where Dr. Downing sat with Student and Father in their living room and talked to Father about what he wanted for his son. Dr. Downing did not conduct any formal assessments on either of the two visits. Between 2002 and 2006, Dr. Downing did not see Student for purposes of any formal assessment or in her role as an "assessor," although she has seen Student at state conferences with Father, and during Student's visit to a general education classroom at Chime Charter Middle School in 2005. Dr. Downing testified Student was welcomed and was not disruptive to the classroom.

48. Dr. Downing prepared a written Consultant Report dated March 18, 2006, which set forth "suggestions" for Student's educational team to consider in determining an appropriate educational program. In the Consultant Report, Dr. Downing acknowledged her suggestions were "not based on any formal assessment procedure." Dr. Downing "strongly suggested" Student's placement should be a full time placement in a fourth grade general education class, where he could benefit from the appropriate role models and conversational partners provided by his peers. While Dr. Downing is a well-credentialed expert, her testimony is not persuasive. Her opinions are not based on any formal assessment procedures. In addition, Dr. Downing emphatically testified she has "never" recommended an SDC setting for any child and "hopefully never will." This indicates Dr. Downing's recommendation as to Student's LRE is not based on Student's unique educational needs, which is contrary to a basic tenet of the IDEA that a child's program and services must be based on the unique educational needs of the child.

49. The LRE for Student is the placement offered by the District, namely an SDC classroom at the Encinitas School.

Sufficiency of IEP Documents

50. To constitute a denial of a FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process.[5]

51. Student contends Father was unable to adequately assess the District's offers contained in the February 9, 2006 IEP and the May 1, 2006 IEP because the IEP documents lacked "sufficient, clear, and legally required information." The evidence supports Student's contention that some of the goals fail to specify a method for measuring progress or a schedule for reporting progress. However, no persuasive evidence was offered that this affected Father's ability to assess the District's offer of FAPE. The IEP goals that Student complains lack a reporting schedule or method of measurement are the PT goals developed by physical therapist Dayle Armstrong. The PT goals from the February 9, 2006 IEP are similar to the PT goals Ms. Armstrong developed for the December 9, 2005 CAVA IEP.[6] The PT goals in the December 9, 2005 IEP document also lacked a reporting schedule and method of measurement, but that apparently did not affect Father's ability to assess the CAVA IEP since Father consented to and signed the CAVA IEP.

52. Student also contends the February 9, 2006, and May 1, 2006 IEP documents failed to specify the supports and modifications necessary for Student's participation in the general education setting. This contention is not supported by the evidence. According to the February IEP document, Student will have the support of a one-to-one aide "within [the] educational environment at a school site during school hours." The mainstreaming

[5] *See* Legal Conclusion 4.

[6] *Compare* Student's Exhibit 33, pp. 204-211 (February 9, 2006, IEP) with Student's Exhibit 26, pp.174-177 (December 9, 2005, CAVA IEP).

opportunities contemplated for Student (i.e., lunch, recess, assemblies, other activities) will occur during the school day while Student is supported by a one-to-one aide. The May IEP document reiterates the offer of a one-to-one aide.

53. Student also contends the IEP team failed to document its rationale for placement in a setting other than the school and classroom Student would have otherwise attended if he were not a special education pupil. Specifically, Student complains the IEP documents do not indicate why Student's need for specialized equipment, repositioning throughout the day, specialized feeding, and other unique needs could not be implemented in a general education classroom. Student cites California Code of Regulations, title 5, section 3042, subdivision (b). Student's argument misstates the regulation. Section 3042 does not require the IEP team to document why Student's needs could not be met in a general education classroom. Rather, the regulation requires the IEP team to document the rationale for placement in the special education classroom. In other words, the IEP team did not have to explain why the general education setting will not work for Student, as Student contends. Rather, the IEP team only had to document the rationale for recommending placement in the SDC setting. The February and May IEP documents are sufficient.

54. The evidence does not support Student's contention the February 9, 2006 IEP failed to identify the duration and location of the special day class, and the May 1, 2006 IEP failed to specify the frequency and duration of speech and language services. The May 1, 2006 IEP document specifies the frequency of speech and language services as 90 minutes per week, and the duration as one year. The February 9, 2006 IEP document specifies the duration of the SDC as one year and the location as "LACOE."

55. The District is required to present a formal, written offer of placement to Student's parents.[7] Through the February 9, 2006, IEP, the District offered, in writing, a specific placement to the extent possible without the cooperation of the Student's parents. At the time of the February 9, 2006 IEP meeting, the District could only offer a referral to LACOE, which Student's parent was required to sign before the referral could be made. The February 9, 2006 IEP indicates that the SDC placement would not begin until March 1, 2006 in anticipation of Student's parent signing the referral and another IEP team meeting being convened before that date to offer a specific classroom.

56. The February 9, 2006 IEP indicates that further IEP meetings are contemplated. There is the indication of the referral to LACOE to determine an appropriate SDC placement. From reading the IEP document, Father knew the IEP team was recommending an SDC classroom on a LACOE campus. The February IEP also recommended a comprehensive assessment in several specified areas. Presumably, another IEP meeting would be held to discuss the results of assessments. In the February 9, 2006 IEP, the District made as specific a written offer of placement as was possible under the circumstances at that time. The May 1, 2006 IEP, specified the SDC classroom recommended for Student's placement. The goals and objectives, and services, from the

[7] *See Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519.

February 9, 2006 IEP were continued in the May 1, 2006 IEP. The District complied with its obligation to provide Student's parents with a written offer, based on the February 9, 2006, and May 1, 2006 IEP documents.

57. The District did not commit procedural violations in developing the February 9, 2006, and May 1, 2006 IEP documents.

58. In sum, the District offered Student a FAPE for the 2005-2006 school year, based on the offer reflected in the February 9, 2006 IEP and May 1, 2006 IEP.

Compensatory Education

59. Father testified at the hearing regarding several areas for which he is seeking compensatory education for services he contends the District was required but failed to provide. However, because the District complied with its obligation to provide Student a FAPE since the time of his transfer, there is no basis to award compensatory education. Part of Father's claim for compensatory education is that the District failed to provide the "collaborative" services recommended in the December 9, 2005 CAVA IEP. As noted in Factual Finding 28, collaborative services were not required during the 30-day interim period because Student's placement was independent study/home instruction and not a classroom setting. Father also refused the teacher (Karen Boucher) offered by the District for Student's home instruction. No evidence was presented establishing the basis of Father's refusal. Father cannot now claim compensatory education based on his refusal of the teacher offered by the District. The testimony of speech therapists Melissa Stenzel and Stacey Boucher established Student received 90 minutes of speech and language services, although the testimony was conflicting as to who actually provided the services. Regardless, these two service providers were paid by the District for the speech and language services they provided to Student.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code § 56000.) A FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge, that meet the State's educational standards, and that are provided in conformity with the child's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined, in pertinent part, as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code § 56031.) "Related services" is defined, in pertinent part, as developmental, corrective, and other supportive services, including physical and occupational therapy, as may be required to assist a child with a disability to benefit from special education." (20 U.S.C. § 1401(29).)

2. In *Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court determined that a child's IEP must be reasonably calculated to provide the child with some educational benefit to satisfy the IDEA, but that the school district is not required to provide the child with the best education available or instruction and services that maximize the child's abilities. (*Id.* at 198-200.) The Court held that a school district is required to provide only a "basic floor of opportunity" consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the child. (*Id.* at p. 201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley*, *supra*, 458 U.S. at 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

3. The analysis of whether a school district has provided a FAPE to a student is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.)

4. While a student is entitled to both procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) To constitute a denial of a FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process. (*Ibid; see also* 20 U.S.C. § 1415, subd. (f)(3)(E)(ii).)

5. The U.S. Supreme Court has ruled that the petitioner in a special education administrative hearing has the burden to prove their contentions at the hearing. (*Schaffer v. Weast* (Nov. 14, 2005, No. 04-698) ___ U.S. ___, [126 S. Ct. 528, 2005 U.S. Lexis 8554].)

6. Special education and related services must be tailored to meet the unique needs of the child with a disability by means of an IEP. (*Polk v. Centra Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3rd Cir. 1988).) The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (20 U.S.C. § 1401(14) and § 1414(d)(1)(A); Ed. Code §§ 56032, 56345; *Honig v. Doe*, 484 U.S. 305, 311 (1988).)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Christopher S. v. Stanislaus County Off. of Education*, 384 F.3d 1205, 1212 (9th Cir. 2004).) "An IEP is a snapshot, not a retrospective." (*Adams, supra*, 195 F.3d at 1149, citing *Fuhrmann v. East Hanover Bd. of Education*, 993 F.2d1031, 1041 (9th Cir. 1993).) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the

alternative preferred by the parents. (*Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).)

8. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

9. When determining whether a placement is the LRE, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect of the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.) However, "the IDEA's preference for mainstreaming is not an absolute commandment." (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 836.) "In some cases, such as where a child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In this situation continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment." (*Id.* 67 F.3d at p. 834.)

10. A school district shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting, including scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.345(a)(2).) "If neither parent can attend, the public agency shall other methods to ensure parent participation, including individual or conference telephone calls." (34 C.F.R. § 300.345(c).) An IEP meeting "may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must have a record of its attempts to arrange a mutually agreed on time and place." (34 C.F.R. § 300.345(d).)

11. 20 U.S.C., section 1414, subdivision (d)(2)(C)(i)(I), provides: "In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had <u>*an IEP that was in effect*</u> in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State

law." (Emphasis added.) Similarly, 34 C.F.R., section 300.323(e) contains the same requirements as Section 1414, subdivision (d)(2)(C)(i)(I), and applies to transfer students "who had *an IEP that was in effect* in a previous public agency in the same State." (Emphasis added.)

12. Under California law, Education Code section 56325, subdivision (a)(1), provides, in pertinent part: "As required by [20 U.S.C., section 1414, subdivision (d)(2)(C)(i)(I)], . . . In the case of an individual with exceptional needs who has *an individualized education program* and transfers into a district from a district not operating programs under the same local plan in which he or she was last enrolled in a special education program within the same academic year, the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved individualized education program or shall develop, adopt, and implement a new individualized education program that is consistent with federal and state law." (Emphasis added.)

13. The Office of Special Education Programs (OSEP), which is the agency charged with administering the IDEA, stated: "States must ensure that the intrastate transfer of handicapped students does not result in any interruption of special education and related services. If a handicapped child moves to a new school district within the same state and the parents and the new school district are unable to agree on an interim placement, the new school district must implement the old IEP to the extent possible until a new IEP is developed and implemented. To the extent that implementation of the old IEP is impossible, the new district must provide services that approximate, as closely as possible, the old IEP." (*Letter to Campbell*, 213 Educ. for the Handicapped L. Rep. 265 [104 LRP 4208] (OSEP Sept. 16, 1989).)

14. In *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, the Ninth Circuit held: "[W]hen a dispute arises under the IDEA involving a transfer student, and there is disagreement between the parent and the student's new school district about the most appropriate educational placement, the new district will satisfy the IDEA if it implements the student's last-agreed-upon IEP; but if it is not possible for the new district to implement in full the student's last-agreed upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible. The plan thus adopted will serve the student until the dispute between parent and school district is resolved by agreement or by administrative hearing with due process." *Vashon, supra,* 337 F.3d at 1134 (citing *Letter to Campbell, supra*).

15. An expert's credibility may be evaluated by looking to his or her qualifications. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App. 3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

16. Compensatory education is an equitable remedy to compensate a student for lost educational opportunity when a school district has failed to provide the student with appropriate special education services. (20 U.S.C. § 1415(i)(2)(C)(iii).) "The purpose of compensatory education is to replace lost educational services." (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 44 F.3d 1149, 1156; *Burlington v. Dept. of Education* (1985) 471 U.S. 359, 374.) "Compensatory education is not a contractual remedy but an equitable remedy, part of the Court's resources in crafting appropriate relief . . . designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1496, 1497.) There is no obligation to provide day-for-day or hour-for-hour compensation for missed services. (*Id.*)

Determination of Issues

Issue No. 1: Did the District offer Student a FAPE in the least restrictive environment for the 2005-2006 school year, based on the February 9, 2006, IEP and the May 1, 2006, IEP?

Issue No. 2: *Did the District fail to offer Student a FAPE for the 2005-2006 school year and prospectively for the 2006-2007 school year?*

17. Issue Nos. 1 and 2 both require an analysis of whether the District offered Student a FAPE based on the February 9, 2006 IEP and the May 1, 2006 IEP. Consequently, these two issues will be analyzed together. The District has the burden of proof as to Issue No. 1. Student has the burden of proof as to Issue No. 2.

18. Based on Factual Findings 2-3, 12-17, 25, 28, 32-35, 36-49, 51-58 and Legal Conclusions 1-9, the District offered Student a FAPE in the least restrictive environment for the 2005-2006 school year. Based on Factual Finding 59 and Legal Conclusions 16, Student is not entitled to compensatory education.

19. The District is the prevailing party for Issue Nos. 1 and 2.

Issue No. 3: Did the District commit procedural violations in connection with the December 9, 2005, CAVA IEP and/or the December 20, 2005 intake meeting?

20. Based on Factual Findings 9, 12-30 and Legal Conclusions 11-14, the District did not commit procedural violations when it held an intake meeting on December 20, 2005, and developed an interim offer of placement and services. Student contends the District was required to implement the December 9, 2005 CAVA IEP at the time of his transfer or, alternatively, develop and implement a new IEP within 30 days of his transfer.

21. The IDEA provisions regarding transfer students refer to "an IEP that was in effect." (20 U.S.C. § 1414, subd. (d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).) However, Education Code section 56325, subdivision (a)(1), refers only to a "previously approved" IEP. Section 56325(a)(1), on its face, indicates it is based on the requirements of Section

1414(d)(2)(C)(i)(I). Thus, the "previously approved" IEP referred to in Section 56325(a)(1) must refer to the IEP that was "in effect" at the time of the pupil's transfer. This interpretation is also consistent with the policy underlying the transfer statutes to prevent an interruption or disruption in the transferring pupil's services while the parents and the school district resolve disagreements about an appropriate placement.

22. At the time of Student's transfer into the District on December 12, 2005, the IEP that was "in effect" was the December 12, 2002 CAVA IEP. The December 9, 2005 CAVA IEP was never "in effect" because Student transferred to the District on the date services were to commence under that IEP (i.e., December 12, 2005). Moreover, the full-inclusion general education placement provided in the December 9, 2005 CAVA IEP could not have been "in effect" while Student was in the CAVA program. CAVA is an on-line "virtual" school and does not have a physical location with classrooms. Consequently, CAVA itself could not implement the full-inclusion general education placement it recommended in the December 9, 2005 IEP.

23. Because the District and Father disagreed as to an appropriate placement, the District's obligation was to "adopt a plan that approximates the student's old IEP as closely as possible." (*Vashon, supra*, 337 F.3d at p.1134.) The District appropriately relied on Student's December 12, 2002 CAVA IEP for an interim placement. The DIS services offered at the December 20, 2005 intake meeting were based on information provided by Father at the meeting regarding Student's then-current level of services. With the exception of OT, the amount of DIS services offered were equal to or greater than the DIS services provided in the December 12, 2002 IEP. The District's offer at the December 20, 2005 intake meeting ensured continuity in Student's existing program pending resolution of the disagreement between the District and Father regarding placement.

24. Requiring the District to provide an interim placement in accordance with the last-implemented IEP rather than an approved, but not yet implemented, IEP promotes the policy of minimizing disruption to Student's program caused by a transfer, especially when the parent and new school district disagree on an appropriate placement. In this case, a full-inclusion general education placement for Student at this point would be disruptive, as he has not been educated in any classroom setting for the last three years, nor has he been observed in a classroom setting by his providers. Physical therapist Dayle Armstrong, who has worked with Student for 10 years, testified she does not know how Student would react to a regular classroom nor how long he would be able to tolerate such a setting, because it has been a long time since he has received educational instruction in a classroom setting.

25. The District did not commit procedural violations when it did not have a full IEP team at the December 20, 2005 intake meeting. The December 20, 2005 meeting was not an IEP meeting. It was an intake meeting to determine Student's interim placement and services after his transfer into the District on December 12, 2005. Student contends that the District's failure to implement the December 9, 2005 IEP meant that the District had to "immediately" hold an IEP meeting to develop a new IEP. There is no legal support for this contention.

26. The District did not unilaterally change Student's placement at the December 20, 2005, intake meeting. At the time of the December 20, 2005 intake meeting, Student's last placement with CAVA was independent study, home instruction. At the December 20, 2005 intake meeting, the District offered Student the same placement. There was no "unilateral" change of placement by the District and, thus, no procedural violation.

27. In sum, the District did not commit procedural violations, as alleged by Student, in connection with the December 9, 2005 CAVA IEP and/or the December 20, 2005 intake meeting. The District is the prevailing party for Issue No. 3.

Issue No. 4: Did the District commit procedural violations in connection with the IEP meetings held on February 9, 2006, and May 1, 2006?

28. Based on Factual Findings 32-33 and Legal Conclusion 10, the District did not commit procedural violations in the scheduling of the February 9, 2006 IEP meeting.

29. Based on Factual Findings 50-57, the District did not commit procedural violations in connection with the IEP documents pertaining to the February 9, 2006, and May 1, 2006 IEP meetings.

ORDER

1. The District prevailed on all issues heard and decided.

2. All of Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

DATED: October 10, 2006

Erlinda G. Shrenger

ERLINDA G. SHRENGER
Administrative Law Judge
Special Education Division
Office of Administrative Hearings